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No. 09-108

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAWRENCE PATRICK DAVIS,

Petitioner,

v.

TARRANT COUNTY, TEXAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT JUDGES IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioner is Lawrence Patrick Davis.

Respondents are Tarrant County, Texas and the following judges in both their individual and official capacities: Sharen Wilson, Wayne Salvant, Elizabeth Berry, Mike Thomas, Mollee Westfall, Everett Young, Scott Wisch, George Gallagher, Robert K. Gill, James Wilson, and Jeff Walker.

This brief is filed on behalf of all respondents except Tarrant County.

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BRIEF FOR THE RESPONDENT JUDGES IN OPPOSITION

Unable to identify any conflict among the circuits on a question of federal law, petitioner seeks to embroil the Court in his local dispute with the respondent judges of Tarrant County, Texas—whose challenged actions have purportedly "circumvented the purpose and spirit" of a state statute governing the procedure by which attorneys are appointed to represent indigent criminal defendants in Texas. Pet. 10. Neither of the two questions presented warrants the Court's involvement. Based on the absence of circuit conflict, the fact-bound nature of petitioner's arguments, and the correctness of the court of appeals' judgment, the petition for a writ of certiorari should be denied.

STATEMENT

The respondent judges incorporate by reference the statement of facts contained in the court of appeals' opinion, Pet. App. 2-10, but wish to highlight several significant points.

1. As his complaint reflects, petitioner's application for inclusion on the list of attorneys who receive appointments to represent indigent criminal defendants in Tarrant County courts was made in 2005 under a now-superseded set of guidelines. R.14 (Complaint 6); Pet. App. 7-8, 10, 47-52.[1] Petitioner did not reapply after a new appointment plan was

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1. "R." refers to the record as paginated by the court of appeals. Petitioner's complaint (along with all other district court filings) may be viewed on the Northern District of Texas's "CM/ECF Docket Sheets" website (No. 4:07-cv-00444). Circuit-court filings may be viewed on the Fifth Circuit's "PACER" website (No. 07-11223).

implemented in 2006 (Pet. App. 61-81), nor did he allege that he would have applied under the 2006 plan but for its new provisions. Instead, he successfully applied to receive appointments in neighboring Dallas County. R.18-19 (Complaint 10-11). He alleged only that, after implementation of the 2006 plan in Tarrant County courts, eligible attorneys who—unlike himself—actually applied under that plan would have grounds to complain. R.18-19, 24 (Complaint 10-11, 16).

2. Although petitioner quotes a provision of the Texas Code of Criminal Procedure referring to the "objective qualifications necessary for an attorney to be included" on a list of counsel who will receive criminal appointments, TEX. CODE CRIM. PROC. art. 26.04(e)(1)(A)(ii) (quoted at Pet. 7-8), he fails to acknowledge that the same statute also calls for a subjective determination by the judges of the courts in which appointed counsel will appear. Specifically, the statute provides that, in addition to "meet[ing] the objective qualifications specified by the judges," each attorney whose name appears on the criminal-appointment list must be "approved by a majority of the judges who established the appointment list." *Id.* art. 26.04(d)(2), (4). Accordingly, petitioner's assertion that the 2006 appointment plan "was contrary to the specific language" of article 26.04, Pet. 7, is erroneous.

The respondent judges also contest petitioner's characterization of either the superseded appointment guidelines or the 2006 appointment plan as "county policy." Pet. 5; *see also* Pet. 15 (erroneously describing the respondent judges as "the final policy makers of

Tarrant County" (internal quotation marks omitted)). Under article 26.04, appointment plans are adopted by judges, not counties. TEX. CODE CRIM. PROC. art. 26.04(a); *see* Pet. App. 26-28 (court of appeals' rejection of petitioner's argument that Tarrant County could be held liable for actions taken by the respondent judges in their judicial capacities). Both before and after the changes to article 26.04 that the court of appeals described, Texas judges remained responsible for appointing counsel for indigent criminal defendants. Pet. App. 5-7.

REASONS TO DENY THE PETITION

I. THE COURT OF APPEALS' STANDING ANALYSIS IMPLICATES NO CONFLICT AND TURNS ON THE FACTS OF THIS ONE CASE.

The court of appeals explained that, to satisfy the standing doctrine's injury requirement in a case such as this one, "a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it." Pet. App. 10-11. Because petitioner never filed an application under the 2006 appointment plan, the court of appeals held that he lacked standing to challenge that plan, Pet. App. 12, adding that any argument he might have advanced under the futility doctrine would fail. Pet. App. 11-12.

A. Petitioner's arguments that the Fifth Circuit's standing analysis conflicts with this Court's decision in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), and the Fifth Circuit's own, earlier

decision in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), Pet. 12, are conspicuously flawed.

1. The Court's decision in *Goldsmith* did not even mention standing, let alone advance a point of law with which the court of appeals' standing analysis conflicts. *Goldsmith* involved the denial of a certified public accountant's application to practice before a tax appeals board. 270 U.S. at 119-20. The Court considered whether the board could exclude advocates from appearing before it based on its rules governing professional qualifications and character. *Id.* at 120-21. Although the Court concluded that the board did have that power, it explained, in *dicta*, that because the accountant met all of the requirements stated in the board's rules, he should have been granted a hearing before his application was denied. *Id.* at 122-23. The Court ultimately denied relief, however, because the accountant never asked the board for a hearing. *Id.* at 123-24.

Even assuming *Goldsmith*'s *dicta* regarding an accountant's right to a hearing could support petitioner's merits argument that he was entitled to a hearing in connection with the denial of his 2005 application under the superseded felony appointment guidelines, it could not support an argument that he had standing to challenge the new, 2006 appointment plan under which he neither applied nor alleged that he would have applied but for its purported unconstitutionality. *See* R.18-19, 24 (Complaint 10-11, 16). As already noted, *Goldsmith* does not address standing at all, so it could not possibly conflict with the court of appeals' standing analysis.

2. Nor does the court of appeals' decision in this case conflict with its earlier decision in *Okpalobi*. Unlike *Goldsmith*, *Okpalobi* did address standing. But it did so in a legally and factually distinguishable context. And as in this case, it concluded that the standing requirement had *not* been met.

a. *Okpalobi* involved a facial challenge to a state statute providing a private cause of action against physicians who perform abortions. 244 F.3d at 409. In the only arguably relevant portion of its decision, the Fifth Circuit considered whether the standing doctrine's causation and redressability requirements could be satisfied even though the defendant officials lacked the power to enforce the statute. *Id.* at 426-27. The court concluded that the plaintiffs could satisfy neither requirement. *Id.* at 427, 429.

Here, the question is whether any of the standing doctrine's requirements, but in particular the "injury in fact" requirement, can be satisfied even though petitioner neither applied under an allegedly unconstitutional plan nor alleged a desire to do so—but chose instead to apply under a different plan that allowed him to receive appointments in a neighboring county. Because the facts relevant to the question of standing in *Okpalobi* and this case are incomparable, and because the court of appeals' standing analysis turned on the absence of any possible injury in fact arising from an appointment plan under which

petitioner never applied, no conflict could arise from the two decisions.[2]

b. But even if there were a conflict between the court of appeals' decisions in *Okpalobi* and this case, that conflict would not warrant this Court's review. Rather, it would be an intra-circuit conflict—and, as such, appropriate for resolution by the court of appeals. *Compare* FED. R. APP. P. 35(a)(1) (providing that *en banc* review "ordinarily will not be ordered unless . . . [it is] necessary to secure or maintain uniformity of the court's decisions") *with* SUP. CT. R. 10(a) (providing that review on certiorari is appropriate where "a United States court of appeals has entered a decision in conflict with the decision of *another* United States court of appeals on the same important matter" (emphasis added)). The court of appeals, however, denied petitioner's request for rehearing *en banc* (which likewise asserted the conflict with *Okpalobi* claimed here, CA5 Pet. for Reh'g *En Banc* 8-10) without requesting a response. Because there is, in fact, no intra-circuit conflict, that disposition was correct.

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2. Petitioner's suggestion that, like *Okpalobi*, this case involves "[a] litigant challenging the validity of a state statute," Pet. 13, is incorrect; his complaint asserted no such challenge. Petitioner also wrongly suggests that he would have standing to assert "the rights of indigent defendants." Pet. 11; *see also* Pet. 12 (stating that "this issue involves a substantial question of constitutional right"). To the extent petitioner has standing at all, he has standing to assert only his own alleged rights as a criminal defense attorney.

B. Beyond the absence of conflict, there is another reason for the Court to deny review of petitioner's first question. The court of appeals' standing analysis turns on the particular facts of this case; it implicates no broad questions of law.

More difficult questions of standing might arise in this context if a would-be attorney applicant either affirmatively refused to sign an application form imposing a purportedly unconstitutional condition or alleged that any application would be futile because rejection was a foregone conclusion. Neither of those questions could arise in this case, however, because petitioner did not allege or argue that he would have applied under the 2006 plan (to which he objected only in theory, on behalf of other attorneys who may have applied or wished to apply, R.24 (Complaint 16)), and he expressly disclaimed reliance on the futility doctrine, *see* Pet. App. 11-12, in both the court of appeals and this Court. Pet. 14; CA5 Pet. for Reh'g *En Banc* 8. Accordingly, this case could not be a vehicle for addressing any question of standing other than the uncontroversial one that the court of appeals decided based on the facts before it.[3]

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3. Although petitioner articulates it only vaguely, Pet. 13-14, any argument for standing based on the text or purpose of the Declaratory Judgment Act would likewise fail. *See Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (explaining that jurisdiction under the Act depends on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-42 (1937))).

II. THE JUDICIAL IMMUNITY QUESTION LIKEWISE RAISES NO CONFLICT AND IS LIMITED TO THE FACTS OF THIS CASE.

Petitioner next asserts that the court of appeals' judicial immunity analysis conflicts with the Second Circuit's decision in *Mitchell v. Fishbein*, 377 F.3d 157 (2d Cir. 2004). Pet. 16. It does not.

Mitchell involved an attorney who had been certified on a list of counsel eligible to receive public compensation for representing indigent criminal defendants in New York courts. 377 F.3d at 161. When his renewal application was denied, he sued the volunteer members of a screening committee responsible for determining which attorneys to include on the list, asserting that the denial was unconstitutionally based on his race and his criticism of the allegedly discriminatory selection process. *Id.* at 161-62. The Second Circuit held that quasi-judicial immunity did not protect the members of the screening committee. *Id.* at 174.

For several reasons, there is no conflict between *Mitchell* and the court of appeals' decision in this case. Nor does petitioner's second question—which could at best identify only a misapplication of settled law—otherwise warrant review.

A. 1. In both composition and function, the screening committee at issue in *Mitchell* was notably different from the group of judges at issue here. First of all, the *Mitchell* committee was not composed of judges. It was composed of "volunteers" who "plainly [we]re not judicial officers." *Id.* at 161, 174. For that

reason, *Mitchell* is a quasi-judicial immunity case, *see id.* at 172—not a judicial immunity case, such as this one, in which the decision makers are judges. TEX. CODE CRIM. PROC. art. 26.04(a), (b)(1), (d)(4), (e)(2); R.11-13 (Complaint 3-5).

Second, the *Mitchell* committee had no control over which attorneys New York judges appointed to represent indigent criminal defendants. 377 F.3d at 168. Its function was merely to determine which attorneys, *if appointed by a court*, were eligible to receive public compensation for their services. *Id.* at 168-69, 172. As such, the committee exercised a power that New York judges *lack*. *Id.* at 168 (explaining that, although New York courts have a duty to appoint counsel for indigent criminal defendants, they "do not have inherent authority to provide that an attorney so appointed will be compensated"); *see also Ex parte Virginia*, 100 U.S. 339, 348 (1879) (explaining that, although it was a judge who selected persons eligible to serve as jurors, that function "might as well have been committed to a private person" and "often is given to county commissioners, or supervisors, or assessors").

Because the screening committee's decisions about which attorneys to certify "merely indicate[d] who may . . . receive compensation for appointments that may be made by the courts in the future," the Second Circuit concluded that the committee was acting only as an "administrative aide to the court." *Mitchell*, 377 F.3d at 171. The committee's administrative function was separate from, and had no necessary influence over, the courts' inherent power and duty to appoint counsel for indigent criminal defendants. *Id.* at 168-71.

Because that latter, undisputably judicial function was not at issue in *Mitchell*—but *is* at issue here, *see* Pet. App. 17, 24-26—the two decisions do not conflict.[4]

2. Even assuming, however, that the court of appeals' decision conflicted with *Mitchell*, that conflict alone would not warrant a grant of certiorari. If the Court believes that review may at some point be appropriate in this general area of the law, it should await evidence of a definite split of authority on a clearly identifiable, significant legal question. No such split currently exists.

B. Indeed, petitioner's real assertion is not that the law of judicial immunity is unclear, but rather that it was misapplied in this particular case. In the court of appeals, petitioner conceded, as he must, that the controlling legal question is whether the act complained of is a normal judicial function. Pet. CA5 Br. 19 (agreeing with the district court on this point of law, *see* Pet. App. 39); *see, e.g.*, *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam); *Forrester v. White*, 484 U.S. 219, 227-29 (1988); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Although he now attempts to demonstrate confusion by citing additional factors that courts consider in quasi-judicial immunity cases such as *Mitchell*, Pet. 17-18 & n.4 (citing *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985)), he cannot avoid

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4. Although the court of appeals viewed *Mitchell* as authority supporting petitioner's argument, Pet. App. 20, it did so based on an incorrect belief that the *Mitchell* committee was authorized to determine which attorneys were eligible to *receive criminal appointments*. Pet. App. 20, 23. As already noted, the *Mitchell* committee did not have that power. 377 F.3d at 168-69, 172.

either his earlier concession or the weight of authority underlying it.

Petitioner's only attempt to do so is by inaccurately asserting that the Court's judicial immunity decision in *Mireles* has the same precedential value as a one-sentence, summary affirmance. Pet. 18 (citing *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)). In fact, *Mireles* is a *per curiam* opinion that lays out the reasons for reversing the lower court's judgment. And its recitation of the relevant law on judicial immunity is uncontroversial—as the opening lines of Justice Stevens's dissenting opinion reflect. *Mireles*, 502 U.S. at 14 (Stevens, J., dissenting) ("In determining whether an action is 'judicial,' we consider the nature of the act and whether it is a 'function normally performed by a judge.'" (quoting *Stump*, 435 U.S. at 362)).

Although the Court has recognized that drawing the line between judicial and nonjudicial acts can be difficult, *Forrester*, 484 U.S. at 227, that observation does not mean that certiorari review is warranted every time a lower court allegedly misapplies the law to the facts before it. In this case, petitioner's challenge to the court of appeals' decision implicates no broad issues of law. He merely disagrees with the court of appeals' understanding of how the Texas statute operates. Pet. 19-20 (challenging the lower court's holistic view of the statutory appointment process and citing authorities irrelevant to the assertion of

conflict). That disagreement is insufficient to support a grant of certiorari.[5]

III. BASED ON BOTH THE COURT OF APPEALS' ANALYSIS AND ALTERNATIVE GROUNDS, THE JUDGMENT BELOW IS CORRECT.

The court of appeals' stated reasoning fully supports its judgment. But because additional grounds exist to support that judgment, the ultimate result in this case would not change if the Court granted review—regardless of how it resolved the questions presented.

A. 1. To establish standing, a plaintiff must allege an injury in fact—that is, an invasion of a legally protected interest held by the plaintiff himself, not some third party. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Based on that core constitutional requirement, the Court has explained that a person who never applied for membership in a club lacks standing to challenge its membership policies. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972). Because petitioner neither applied under the 2006 appointment plan nor alleged a desire to do so, that same reasoning applies here. *See* Pet. App. 10-11.

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5. Although petitioner vaguely asserts that the purported conflict between the court of appeals' decision and *Mitchell* "exemplifies similar conflict and disarray on the same issue in some federal district and state courts," Pet. 12, his petition fails to support that claim.

Despite the respondent judges' district-court challenge on this point, petitioner did not seek leave to amend his complaint. Rather, he stood by his original, insufficient allegations. R.255, 260-62 (October 5, 2007 response 7, 12-14); R.334 (November 2, 2007 response 8); R.472, 478-79 (November 20, 2007 response 9, 15-16); R.494-95, 501-02 (November 26, 2007 response 8-9, 15-16). Because standing analysis focuses on the allegations in a plaintiff's complaint, *Allen v. Wright*, 468 U.S. 737, 752 (1984), and because the Court holds the plaintiff to those allegations, *e.g.*, *Sierra Club*, 405 U.S. at 735, 741; *Lujan*, 504 U.S. at 563-64, dismissal was appropriate.

Although the court of appeals went on to address the futility doctrine, Pet. App. 11-12, petitioner has expressly disclaimed any reliance on that doctrine. In both this Court and the court of appeals, he conceded that he "never argued or speculated that he would be rejected if he reapplied" under the 2006 appointment plan. Pet. 14; CA5 Pet. for Reh'g *En Banc* 8. That concession, which underscores the limitations of his complaint, reflects that the court of appeals could not have erred in rejecting any potential reliance on the futility doctrine.

Finally, although the court of appeals did not address it explicitly, possession of a "legally protected interest" is another essential element of injury in fact. *Lujan*, 504 U.S. at 560. Petitioner could have no such interest in the elimination of allegedly unconstitutional provisions of an appointment plan under which he did not apply (nor could he even show a protected property

or liberty interest in receiving publicly funded appointments in criminal cases).

2. a. On the question of judicial immunity, there could be no doubt either that appointment of counsel for indigent criminal defendants is a normal judicial function or that judges, and judges alone, are authorized to make those appointments in Texas. TEX. CODE CRIM. PROC. art. 26.04(b)(1). Petitioner does not argue otherwise. Rather, he asserts that, because the respondent judges' denial of his application for inclusion on the appointment list occurred before any specific case arose in which an appointment was necessary, judicial immunity does not apply. Pet. 20-22.

Petitioner's argument ignores the actual operation of the Texas appointment process. Under Texas Code of Criminal Procedure article 26.04, Texas judges' initial selection of the attorneys who will receive indigent appointments is the critical step. After making those selections, the judges simply appoint the selected attorneys in sequential order as cases arise in their courts. TEX. CODE CRIM. PROC. art. 26.04(a); *see* Pet. App. 63. The only exception to that rule applies if a judge "makes a finding of good cause on the record for appointing an attorney out of order," TEX. CODE CRIM. PROC. art. 26.04(a)—for instance, if the attorney next in line on the appointment list has a personal or scheduling conflict that forecloses proper representation of the defendant in a particular case.

As the court of appeals correctly explained, Pet. App. 24-25, article 26.04 merely accelerates the moment at which judges make a decision about which

attorneys may properly represent indigent defendants in cases that arise in their courts. *See* TEX. CODE CRIM. PROC. art. 26.04(d)(2), (4) (stating that the appointment list shall contain the names of attorneys who not only meet the minimum objective qualifications specified by the judges but are also approved by a majority of those judges for inclusion on the list). Which attorneys should be included on the list—and thus appointed in specific cases—is the substantive, judicial decision about which petitioner complains. And because it is a normal judicial function, that decision is shielded by judicial immunity.

b. Despite petitioner's contention, Pet. 20-21, the Court's decision in *Rothgery v. Gillespie County*—which addressed whether the right to counsel under the Sixth Amendment attaches at an initial hearing even if no prosecutor is present, 128 S. Ct. 2578, 2581 (2008)—does not disturb the court of appeals' judicial immunity analysis. Petitioner's reliance on *Rothgery* depends on the premise that, under article 26.04, judges' approval of counsel to represent indigent defendants has no connection to the appointment of counsel in specific cases.

As already noted, that premise is flawed. The initial decision about which attorneys to include on the list determines which attorneys will be appointed in specific cases. Accordingly, neither *Rothgery* nor Texas statutory and common law requiring a reliable showing of indigence before the right to appointed counsel arises, Pet. 20, poses any threat to the court of appeals' analysis.

B. Finally, even assuming the court of appeals' reasoning were vulnerable to petitioner's criticisms, alternative grounds for affirmance make this case a poor candidate for review. If the Court granted the petition, the respondent judges would further defend the court of appeals' judgment by advancing other grounds raised in, but not reached by, the courts below. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982) (noting that respondents "may rely upon any matter appearing in the record in support of the judgment below"); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979) (explaining that a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

Because the court of appeals concluded that lack of standing and judicial immunity barred petitioner's claims, it did not reach several additional arguments—including ones based on legislative, qualified, and Eleventh Amendment immunity and the absence of a state-law property or liberty interest in receiving publicly funded court appointments—that were asserted in the alternative below. If the Court were to grant review, the respondent judges would fully present those arguments and show that the court of appeals' judgment should be affirmed regardless of how the Court might otherwise wish to answer either of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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